

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FRANK FUMAI,	:	CIVIL ACTION
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
	:	
HARVEY LEVY, SUBURBAN	:	
THERAPY, INC., and	:	
SUBURBAN MEDICAL ASSOCIATES,	:	
	:	
Defendants.	:	NO. 95-1674

**FINAL ADJUDICATION INCLUDING FINDINGS OF FACT
AND CONCLUSIONS OF LAW, VERDICT, AND JUDGMENT**

AND NOW, this 28th day of January, 1998, having conducted a non-jury civil trial on January 12 and 13, 1998 in which counsel for plaintiff Frank Fumai (“Fumai”) and defendants Harvey Levy (“Levy”), Suburban Therapy, Inc. (“ST”), and Suburban Medical Associates (“SM”) (collectively “the defendants”) participated, and based upon the pleadings, the evidence presented at trial, and the declarations of counsel, in deciding that the defendants are liable to pay Fumai \$542,236 in commissions plus interest under their brokerage agreement, I make the following findings of fact and conclusions of law:

Findings of Fact¹

1. On November 1, 1990, Fumai and the defendants entered into an agreement (“the agreement”) pursuant to the terms of which Fumai was entitled to receive a percentage of the purchase price paid for the sale of ST or SM if Fumai introduced or procured a purchaser. (Exhibit P-1). The agreement was prepared exclusively by counsel for Fumai. (Stipulation ¶ 4).
2. At the time the agreement was executed, Levy was the Chairman of the Board of ST and Chairman of the Board and President of SM. In addition, Levy owned 66.66% of ST. (Stipulation ¶ 5). At the time the parties entered into the agreement, Fumai was the Chief Operating Officer of Warminster General Hospital. Prior to November 1990, Fumai had no experience as a broker and had never been involved in the purchase or sale of a medical practice as a broker. (Testimony of Fumai).
3. At the time Fumai and the defendants entered into the agreement, ST was in the business of managing physician care services, including the management of SM. ST also owned and leased real property, among other ventures. SM was in the business of providing professional medical care. (Testimony of Levy).
4. The agreement provides in relevant part:

If Broker procures a purchaser for such stock or assets of either or both of [ST] and [SM] and said purchaser purchases such stock or assets, . . . [ST], [SM] and/or Owner shall pay Broker at settlement as compensation for his services the following commissions:
 - a. For the sale of the assets, including tangibles and intangibles, or the stock of Suburban Therapy, Inc. - 10% of the purchase price;
 - b. For the sale of the assets, including tangibles and intangibles, or the stock of Suburban Medical Associates, Inc. - 5% of the

¹ To the extent that these findings of fact include conclusions of law or mixed findings of fact and conclusions of law, these findings and conclusions are hereby adopted by this Court.

purchase price.

Owner acknowledges that his obligations hereunder are joint and several with [ST] and [SM] as the case may be. (Exhibit P-1). The agreement was signed by Fumai as “Broker” and Levy as president of ST and SM and as “Owner.”

5. At some time prior to February 18, 1991, Fumai met with Sherif Abdelhak (“Abdelhak”), CEO of Allegheny United Hospitals (“Allegheny”) and recommended that Allegheny consider purchasing ST and SM. (Testimony of Fumai). In a memo dated February 18, 1991, Fumai provided Abdelhak with information pertaining to the acquisition of ST and SM. (Exhibit D-2). Fumai also set up a meeting between Levy and Abdelhak in February of 1991 to discuss the potential sale. Fumai did not participate in the negotiations between Allegheny and the defendants. (Testimony of Fumai). The parties stipulated that Fumai presented and introduced to Allegheny the opportunity for Allegheny to acquire ST and SM. (Stipulation ¶ 6).

6. Allegheny and The Medical College of Pennsylvania (“MCP”), a wholly owned subsidiary of Allegheny, sent a letter of intent to the defendants dated September 16, 1991. This letter of intent became the contract of sale by which Allegheny and MCP agreed to purchase the assets of ST and SM. (Exhibit P-2.1). The contract of sale was contingent upon and included by reference the execution of an employment contract between Levy and Allegheny. (Exhibit P-2.14). Under § 5(e) of the contract of sale, Allegheny and MCP agreed to purchase the assets of ST and SM only if Levy entered into a written employment and noncompetition agreement with Allegheny. The employment agreement was for five years and required that Levy sign a covenant not to compete with Allegheny. (Exhibit P-2.14). This employment agreement was signed by Levy and delivered to Allegheny at closing. In addition to signing the employment

contract, Levy negotiated for a signing bonus to compensate him for the substantial decrease in salary he would receive by working for Allegheny. (Testimony of Levy). Levy's employment by Allegheny and his inability to compete were considered by Allegheny as vital parts of the entire transaction, such that the transaction would not have closed (and the purchase price not paid) if he had not signed these agreements. (Testimony of Levy, Testimony of Barry Frank, Esq.).

7. In § 3(a) of the contract of sale, entitled "purchase price," the price is paid "[i]n consideration of the transactions described in Section 2(a) above [detailing the sale of the assets of SM to MCP] and the other terms and conditions of this Agreement. . . ." An identical phrase is found in §§ 3(b) and (c) regarding the transactions described in §2(b) and (c), detailing the sale of the assets of ST to MCP and Allegheny. (Exhibit P-2.1).

8. Section 3(d) of the contract of sale provides:

[a]fter the date of this Agreement, the Parties shall consult and devise a schedule allocating the foregoing purchase prices among the assets transferred to [Allegheny] or MCP pursuant to this Agreement and among the signing bonuses for certain officers and noncompetition covenants of the Shareholders, if applicable, described in Sections 5(a) and 16. The parties agree that a substantial portion of the purchase prices specified in this Section shall be allocated in such allocation schedule to the noncompetition covenant of Mr. Levy set forth in Section 16. Such allocation schedule shall be agreed upon and ratified by each of the Parties at Closing.

(Exhibit P-2.1).

9. The parties to the contract of sale negotiated the ultimate purchase price for the assets of ST and SM and later agreed on the allocation of that purchase price essentially at defendants' request for their reasons, including bookkeeping, tax purposes and disbursement to Levy and Dr. Sussman. (Exhibit P-2.1) The purchase price for the assets of ST was allocated by the defendants as follows:

Stated Payment	\$7,240,000
Pay-Off Mortgage Liability	1,167,862
Total Purchase Price ²	\$8,407,862

Signing Bonuses	\$1,225,000
Covenant	4,200,000
Purchased Covenant	48,000
Purchased Goodwill	20,000
F&F/M&E	249,500
Imaging Partnership	7,500
Achievement Center	1,407,862
Goodwill	1,250,000
Total	\$8,407,862

(Exhibit P-5).

The purchase price for the assets of SM was allocated by the defendants as follows:

Stated Payment	\$3,109,000
Total Purchase Price	\$3,109,000

Signing Bonuses ³	\$550,000
Covenant	850,000
Purchased Covenants	331,000
Purchased Goodwill	185,000
F&F/M&E	193,000
Goodwill	1,000,000
Total	\$3,109,000

(Exhibit P-4).

10. The transaction between Allegheny and the defendants closed on October 11, 1991.

Allegheny made payments in installments to ST, and then ST distributed the money to the other defendants according to the allocation. ST received \$4,895,988 for the sale of ST's assets and \$1,674,750 for the sale of SM's assets from Allegheny on the date of closing. The balance of the

² Although the total purchase price for the assets of ST represented here is different than the total purchase price for the assets of ST listed elsewhere in the record, I find that this price reflects the actual price paid by Allegheny for the assets of ST. (Testimony of Levy; Testimony of Barry Frank, Esq.).

³ Dr. Gary Sussman ultimately received the signing bonus allocated from the purchase price of the assets of SM.

purchase price was paid to the defendants through ST over five years in equal installments of \$941,800: \$654,950 for the assets of ST and \$286,850 for the assets of SM on the anniversary of the closing date. (Exhibit P-2.9 and P-2.10). Although the money was received by ST, ST paid Levy the full amount allocated to his signing bonus and restrictive covenant. (Testimony of Levy).

11. Fumai contacted Levy on October 11, 1991 regarding payment of his commission pursuant to the agreement. At that time Levy paid Fumai \$324,000 in commissions earned as a result of the sale of the assets of ST and SM to Allegheny and MCP. On account of such commissions, Fumai received \$60,000 from Levy in 1992, \$50,000 in 1993, and \$20,000 in 1994. (Testimony of Fumai). Levy testified that he discovered in 1994 that Fumai had been overpaid and refused to pay him any more commissions. Because Fumai never received a copy of the contract of sale or any other documents relating to the sale of ST and SM, he relied on Levy to determine the amounts he was owed under the contract. (Testimony of Fumai). He did not find out the actual purchase price for the sale of the assets of ST and SM until after he filed this claim against the defendants. (Testimony of Fumai).

12. Fumai brought a claim in this Court against the defendants to recover the balance of the commissions he claims the defendants owe him. Fumai contends he is entitled to a total of \$993,236 in commissions, which is \$837,786 for the sale of the assets of ST and \$155,450 for the sale of the assets of SM. This is based on a total purchase price of \$8,377,862 for the assets of ST and \$3,109,000 for the assets of SM.⁴ The defendants claim that the terms of the agreement

⁴ Although Fumai originally based his claim for commissions on a purchase price of \$8,377,862, the evidence revealed that the actual purchase price was \$8,407,862. See supra note 2.

are ambiguous and that Fumai is not entitled to commissions on the money paid by Allegheny which was allocated to restrictive covenants, the signing bonuses, the mortgage pay-off amount, or the interest paid to ST over the five years of payments because these allocated items are not part of the “purchase price” for the sale of the assets of ST and SM.⁵

13. At the time this litigation commenced, Fumai was a citizen of New Jersey, the corporate defendants were citizens of Pennsylvania, and Levy was a citizen of Florida. (Stipulation ¶ 7).

The parties waived a trial by jury and agreed to a bench trial before this Court. (Stipulation ¶ 1).

14. The evidence presented at trial established that Allegheny and the defendants considered the signing bonuses and covenants merely an allocation of a part of the purchase price of the assets of ST and SM. In the allocation of purchase price (Exhibit P-4; Exhibit P-5), the parties to the contract of sale twice used the phrase “total purchase price;” once for SM at \$3,109,000 and once for ST at \$8,407,862. Sections 1 and 2 of the contract of sale specify the heart of the transaction without reference to signing bonuses and noncompetition covenants. (Exhibit P-2.1).

Section 3 of the contract of sale entitled “purchase prices” lists aggregate prices of all of these

⁵ The defendants also argued an affirmative defense and counterclaim in their answer and through arguments in motions decided before trial. The defendants contended that the contract was void as against public policy because Fumai breached his fiduciary duties to the defendants when he quashed a potential sale of ST and SM to Continental Medical Systems, and to Allegheny when he failed to disclose to Allegheny his interest in the sale when he recommended that Allegheny purchase ST and SM. Thus, the defendants argued they did not owe Fumai any money under the agreement and were entitled to restitution of the amount already paid to Fumai. The defendants moved for summary judgment on this affirmative defense and counterclaim. The motion for summary judgment was denied in an Memorandum-Order dated December 18, 1997 (Document No. 35). In an Order dated December 19, 1997 (Document No. 34) this Court denied without prejudice Fumai’s motion in limine to suppress argument and evidence regarding Fumai’s alleged breach of fiduciary duty to Allegheny and granted Fumai’s motion in limine to suppress argument and evidence regarding Fumai’s alleged breach of fiduciary duty to the defendants. After the parties submitted supplemental briefing at the request of the Court on the issue of Fumai’s alleged breach of fiduciary duty to Allegheny and after consideration of Fumai’s renewed motion in limine to exclude argument and evidence on this issue and the defendants’ motion for partial reconsideration of the Order of December 19, 1997, this Court excluded all arguments and evidence based on Fumai’s alleged breaches of fiduciary duties in an Order dated January 9, 1998 (Document No. 42) and ruled that the affirmative defense and counterclaim of the defendants failed as a matter of law. This Court issued a Memorandum on January 16, 1998 in support of its Order of January 9, 1998 (Document No. 49).

assets sold at a total of over \$11.5 million which was the total purchase price agreed to by the parties. (Exhibit P-2.1).

15. The terms of the agreement and the evidentiary record show that the intent of Fumai and Levy in forming the contract was to set up an arrangement by which Fumai would use any resources or connections he had through his experience and employment in the health care industry to find a potential buyer for the capital stock or assets of ST and SM. The goal that Fumai and the defendants intended to accomplish was the sale of ST and SM; if Fumai introduced or procured a buyer who eventually purchased ST and SM, the defendants were to compensate Fumai for his services by paying him a percentage of whatever purchase price ST and SM could garner. Setting Fumai's commission as a percentage of the purchase price provided an incentive to Fumai to procure a buyer for ST and SM that would pay the highest total price possible, which would benefit both Fumai and the defendants.

Conclusions of Law⁶

1. This Court has jurisdiction over this case under 28 U.S.C. § 1332.
2. The parties do not dispute and the evidence supports my conclusion that (if the agreement is enforceable at law) Fumai's introduction of the potential sale to Allegheny entitled him to a commission under the agreement based upon the "purchase price." The dispute is over the amount of Fumai's commission.
3. The parties agree that Pennsylvania law applies to the interpretation of the agreement.

⁶ To the extent that these conclusions of law include findings of fact or mixed findings of fact and conclusions of law, these findings and conclusions are hereby adopted by this Court.

The question of whether a contract provision is ambiguous is a question of law. See American Flint Glass Workers v. Beaumont Glass Co., 62 F.3d 574, 581 (3d Cir. 1995). In interpreting a contract, the court should first examine the four corners of the document. See Washington Hospital v. White, 889 F.2d 1294, 1300 (3d Cir. 1989). “In deciding whether a contract is ambiguous, a court does not just ask whether the language is clear; instead it hears the proffer of the parties and determine[s] if there are objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of different meanings.” American Flint, 62 F.3d at 581 (internal quotes omitted); see also In re New Valley Corp., 89 F.3d 143, 150 (3d Cir. 1996), cert. denied, 117 S. Ct. 947 (1997) (quoting same and applying federal common law of contracts).

4. While a court is initially limited in interpreting a contract to the document’s four corners, a court should consider all language within those parameters as a whole. See, e.g., Fidelity Federal Savings and Loan Association v. Felicetti, 830 F. Supp. 262, 269 (E.D. Pa. 1993) (“It is elementary contract law that when interpreting a specific term of a contract, the entirety of the contract must be taken into consideration.”) As a part of this interpretive process, a court should look to the position of the parties to see what they intended to accomplish in forming the contract. See Rainbow Navigation, Inc. v. United States, 742 F. Supp. 171, 185 (D.N.J. 1990), aff’d, 937 F.2d 105 (3d Cir. 1991) (“It is a general principle of contract law that the purpose of an agreement should be considered in construing its terms.”) Finally, a court should not interpret a contract in a way to make any of its provisions unworkable or void. See First Philadelphia Realty Corp. v. Albany Savings Bank, 609 F. Supp. 207, 210 (E.D. Pa. 1985) (observing that contracts should not be construed as to make any provision of the contract meaningless).

5. I conclude that the agreement between Fumai and the defendants is unambiguous and reject the defendants' argument that the agreement is susceptible to different meanings. The plain meaning from the four corners of the contract is clear: Fumai was to be paid a commission based on the entire purchase price if he introduced or procured a purchaser for the sale of the assets or stock of ST or SM.⁷

6. The term "asset" refers to property of all kinds, real and personal, tangible and intangible. An "intangible asset" includes any "nonphysical, noncurrent asset which exists only in connection with something else, for example the goodwill of a business." See Black's Law Dictionary 808 (6th ed. 1990). Nothing in the agreement between Fumai and the defendants suggests that the terms "asset," "intangible asset," and "purchase price" were given any special meaning by the parties other than their common meaning.

7. Having found in ¶ 14 of the findings of fact that Allegheny and the defendants considered the signing bonuses and covenants merely an allocation of a part of the purchase price of the assets of ST and SM, I conclude that the allocation of signing bonuses and covenants not to compete do not reduce the purchase price at all. The total agreed purchase price was \$11,516,862, payment of which was contingent upon ST's and SM's ability to obtain and deliver the covenants of Levy and the other physicians that were requested by Allegheny and MCP. In other words, Allegheny and MCP would not have paid over \$11.5 million for the assets without

⁷ Without objection, the parties submitted considerable evidence and argument to this Court including conversations between Fumai and Levy, the conduct of the parties, the tax returns of the defendants, and draft letters of intent dated April 1991 and June 12, 1991 regarding the sale of ST and SM to demonstrate the parties' understanding of the terms "assets" and "purchase price" at the time they entered into the agreement and the intent of the parties regarding for what part of the purchase price the defendants owe Fumai a commission. Because I find that the agreement is unambiguous, this Court finds that this extrinsic evidence and argument are irrelevant to its findings and conclusions regarding the interpretation of the agreement.

these assurances. Levy's and the other physicians' continued employment with and loyalty to their new employers, which were guaranteed by the covenants and signing bonus, were apparently of high value and importance to Allegheny in its decision to purchase ST and SM. As I have found in ¶ 6 of the findings of fact, the transaction would not have closed if the employment contracts had not been signed. Allegheny expected that its employment of Levy and the other physicians and their agreements not to compete with Allegheny would increase the value of its investment in the purchase of the assets of ST and SM at the full purchase price. Whatever the bookkeeping allocations were did not reduce the true purchase price. Thus, the money allocated to covenants and the signing bonuses is a part of the purchase price on which Fumai's commission will be calculated.

8. I conclude that the mortgage pay-off was as well merely part of the allocation of the purchase price. I reject the defendants' contention that no commission should be paid on the portion of the purchase price that was agreed to be paid by Allegheny toward the defendants' obligations under the mortgage owed by ST. The fact that the parties agreed that a portion of the purchase price would be paid by Allegheny in satisfaction of the mortgage obligation does not lower the total purchase price paid to ST. The sale of real property often requires the payment of the outstanding mortgage owed by the seller. Such a factor does not reduce the purchase price. Here, it is as if Allegheny had given that same amount in cash to the defendants to extinguish the mortgage obligation themselves. Accordingly, the purchase price is not diminished by the mortgage pay-off, and that amount will be included in the total on which Fumai's commission is calculated.

9. I conclude that the interest Allegheny paid to the defendants was as well merely part of

the allocation of the purchase price. I reject the defendants' contention that the interest Allegheny paid to the defendants as part of the installment payments should be excluded from the amount which is used to calculate Fumai's commission. (Exhibit D-39). Fumai was entitled to the full amount of commission the day the agreement for sale was signed. These interest payments were not in addition to the price agreed to be paid, rather the interest was another form of allocation and was included as part of the total purchase price by Allegheny under the contract of sale, entitling Fumai to a percentage of that amount as a commission.

10. Given my finding in ¶ 15 of the findings of fact on the position of the parties and the goals they intended to accomplish by this agreement, it would be contrary to the plain meaning of the agreement to reduce Fumai's commission based on the way in which the defendants and Allegheny allocated the purchase price after that price was negotiated and agreed to in the contract of sale.

11. In addition, I find that the plain terms of the agreement impose joint and several liability on ST, SM, and Levy personally. Even though the agreement's identification of Levy as "Owner" may be factually incorrect as to SM, this designation was for drafting convenience only and does not void the terms of the agreement that plainly state that Levy by name and not in his representative capacity will be jointly and severally liable for commissions owed to Fumai.

12. Fumai is entitled to a total commission of \$996,236; the defendants have paid Fumai \$454,000. Defendants refusal to pay Fumai the balance of his commissions is a breach of the agreement. Thus, the defendants are liable to pay Fumai \$542,236 in commissions. In addition, Fumai is entitled to \$104,198.44 in interest on the commission owed to him calculated at 6%

from November 15, 1994 through the date of the verdict.⁸ Accordingly, the defendants are liable to pay Fumai a total of \$646,434.44.

Verdict

Having found that the defendants breached their contract with Fumai by failing to pay Fumai his full commission based on the total purchase price of the assets of ST and SM, I hereby enter a verdict in favor of Fumai for \$646,434.44.

An appropriate Judgment follows.

⁸ The interest was calculated as follows: \$542,236 at 6% per year for 1169 days (covering November 15, 1994 until January 28, 1998) yields \$104,198.44 in interest.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FRANK FUMAI,	:	CIVIL ACTION
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
HARVEY LEVY, SUBURBAN	:	
THERAPY, INC., and	:	
SUBURBAN MEDICAL ASSOCIATES,	:	
	:	
Defendants.	:	NO. 95-1674

FINAL JUDGMENT

AND NOW, this 28th day of January, 1998, after a non-jury civil trial and based upon the foregoing findings of fact, conclusions of law, and verdict, **JUDGMENT IS HEREBY ENTERED** in favor of plaintiff Frank Fumai and against defendants Harvey Levy, Suburban Therapy, Inc. and Suburban Medical Associates jointly and severally in the amount of \$646,434.44.

LOWELL A. REED, JR., J.